

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 386/2014**

% **Reserved on: 2nd November, 2017**
Pronounced on: 8th November, 2017

MANJULA BANERJEE Appellant

Through: Ms. Tanvi Kakar, Advocate.

versus

STATE AND ORS. Respondents

Through: Mr. Rajshekhar Rao, Mr. Zehra Khan, Mr. Kartik Sundar and Mr. Zahid Ahmad, Advocates for R-2 to 4 with R-2 to 4 in person.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J.

1. This first appeal under Section 299 of the Indian Succession Act, 1925 is filed by the sister and who was the respondent no. 4 in the probate petition filed by respondent no. 2 in the court below seeking probate of the Will of the father dated 18.6.2004. In the probate petition there were a total of six private parties. All six private parties were sons and daughters of the deceased testator Sh. Bisweswar Chatterjee. Present appellant who was respondent no. 4 in

the probate petition had only filed objections. Two other brothers and two sisters being the respondent no. 2/Sh. Bijoy Chatterjee, respondent no. 3/Sh. Amit Chatterjee, respondent no. 5/Smt. Anjana Banerjee and respondent no. 6/Smt. Mandira Banerjee had given their consent for granting of the probate to the petitioner Sh. Dipak Chatterjee, and who is the respondent no. 2 in this appeal.

2. The subject probate petition was filed by the respondent no. 2 herein seeking probate of the Will dated 18.6.2004 executed by the father Sh. Bisweswar Chatterjee. This Will was registered in the office of the Sub-Registrar on 30.6.2005. Sh. Bisweswar Chatterjee died on 10.10.2010.

3. Appellant as objector to the probate petition pleaded that the Will was not executed by the deceased Sh. Bisweswar Chatterjee out of his own free will but the Will was an outcome of fraud and undue influence exercised by the petitioner along with respondent nos. 2 and 3 in the probate petition i.e the two other sons of Sh. Bisweswar Chatterjee. It was pleaded that the Will was registered illegally in the office of a particular Sub-Registrar although it was to be registered with another Sub-Registrar who had jurisdiction. It was pleaded that

the deceased when he executed the subject Will on 18.6.2004 was 89 years of age and was totally dependent on his sons and daughter-in-laws. The Will was pleaded to be executed under undue influence because the deceased father/testator was staying with the petitioner and hence there was undue influence upon the deceased testator by the petitioner. It was further pleaded that the appellant being the eldest child had suffered a bad marriage and therefore she was assured by the father Sh. Bisweswar Chatterjee that she would get a share out of the property owned by him. The property in question is house bearing no. I-1797, Chittaranjan Park, New Delhi-110019. Accordingly, it was prayed that the probate petition be dismissed.

4. After the pleadings were complete the trial court framed the following issues:-

- “i. Whether the Will dated 18.06.2004 in favour of the petitioner is valid? OPP
- ii. Whether the objections filed by the respondent no. 4 are valid and maintainable? OPP
- iii. Relief.”

5. On behalf of the petitioner in the probate petition (respondent no.2 herein) there were depositions of three witnesses. Petitioner deposed as PW-1. The attesting witness to the Will Sh. R.

Goswami deposed as PW-2. The witness from the Sub-Registrar's office who brought the original register of the Wills deposed as PW-3 and he proved the subject Will being registered before the Sub-Registrar on 30.6.2005.

6. Appellant examined only one witness Sh. Shivaji Sen Gupta. Appellant's evidence was thereafter closed as she did not lead evidence for about a dozen of dates of hearings from 13.7.2012 till 1.5.2014. As will be discussed below appellant had repeatedly approached the High Court against orders of closing her evidence, and different Learned Single Judges of this Court granted her opportunities as also extensions, but the same were not availed of by the appellant leading to her evidence being closed. Appellant even did not avail the opportunity for getting her examination and cross-examination done by video conferencing and as was permitted by the order of the probate court dated 1.5.2014.

7.(i) The first issue to be addressed by this Court is as to whether evidence of the appellant was rightly closed by the trial court/probate court below. In my opinion no such ground can be urged by the appellant in this appeal because the challenge laid by the

appellant in this Court vide C.M.(M) No. 605/2014 challenging the order of the probate court dated 9.5.2014 closing her evidence failed as C.M.(M) No. 605/2014 was dismissed by an order dated 2.7.2014 and which order dated 2.7.2014 thus binds the appellant, but be that as may, in my opinion, the appellant can have no grievance in this regard because it is seen that for the first time evidence of the appellant was fixed vide order dated 7.5.2012 for 13.7.2012. On 13.7.2012, no evidence was recorded of the appellant and therefore the case was adjourned for evidence of the appellant on 26.9.2012. Again on 26.9.2012 no evidence was led on behalf of the appellant and therefore the matter was adjourned to 28.1.2013 subject to payment of costs of Rs.5,000/- for recording of evidence on 28.1.2013. On 28.1.2013, appellant once again did not lead evidence and also did not pay costs and therefore her right to lead evidence was closed. Appellant challenged the order closing her right to lead evidence before this Court by filing C.M.(M) No. 221/2013. A Learned Single Judge of this Court in the interest of justice gave one opportunity to the appellant to complete her evidence. This order dated 3.4.2013 in C.M. (M) 221/2013 reads as under:-

“CM(M) No.221/2013

1. The main grievance of the petitioner is that her right to lead evidence was closed vide impugned order dated 28.1.2013 and 30.1.2013. The petitioner herein is respondent No.4 before the learned trial court.

2. On the last date of hearing, it was submitted on behalf of the petitioner that she does not want to cross-examine Bijoy Chatterjee and Amit Chatterjee and she only wants to lead her evidence.

3. Learned counsel for respondent has fairly conceded to her request and stated that he has no objection if the petitioner i.e. respondent No.4 before the learned trial court be given one opportunity to lead her evidence.

4. With the consent of parties, the impugned order is set aside and the petitioner/respondent No.4 is given one opportunity before the learned trial court to lead her entire evidence.

5. Learned counsel for petitioner submits that petitioner is presently in London and she shall be filing her affidavit by way of evidence as well as the affidavit of her other witnesses will be filed within six weeks from today and thereafter the petitioner i.e. respondent No.4 and her witnesses shall appear before the learned trial court on 9.7.2013 for the purposes of cross-examination. If the petitioner does not avail this opportunity, her right to lead evidence shall stand closed on that date. This opportunity is given subject to cost of Rs.7,000/-.

Petition stands disposed of accordingly.

CM No.3277/2013 (stay)

In view of the order on the main petition, no orders are required on this application.

The same stands disposed of accordingly.”

(ii) The appellant however did not lead evidence but instead filed an application for extension of time before this Court in C.M.(M) No. 221/2013 and another Learned Single Judge of this Court vide his order dated 29.7.2013 allowed taking on record the delayed affidavits by way of evidence filed on behalf of the appellant and which extension was granted on the ground that that appellant was said to be ill. By the order dated 29.7.2013 a convenient date to the appellant

was given for recording of her evidence in terms of an application which was to be filed before the trial court. Trial court, in the meanwhile, had fixed 9.7.2013 for recording of evidence of the appellant and which was thereafter adjourned to 12.8.2013. On 12.8.2013 on account of the Presiding Officer being on leave, the matter was adjourned to 20.9.2013 and when on 20.9.2013 the matter came up before the trial court, the trial court in terms of the order dated 29.7.2013 passed on the application filed by the appellant for extension of time for filing her affidavits (and which was first granted to her by the order dated 3.4.2013 in C.M. (M) No. 221/2013) for fixing the case somewhere in October, accordingly directed the listing of the matter for evidence of the appellant on 3.10.2013. On 3.10.2013 however, instead of leading evidence the appellant filed an application that the matter be transferred to another District and Sessions Judge as the suit property which is the subject matter of the Will is situated in the jurisdiction of another District and Sessions Judge and to which the District and Sessions Judge observed by his order dated 3.10.2013 that if the matter had to be transferred to another District and Sessions Judge an application under Section 24 CPC will have to be filed. By

the order of a Learned Single Judge of this Court vide order dated 7.12.2013 in TR.P.(C) No.112/2013 the matter was transferred to a different District and Sessions Judge and parties were directed to appear before the concerned District and Sessions Judge on 2.1.2014. Thereafter, once again, appellant did not lead evidence and since the dilatory tactics of the appellant had become rampant trial court once again closed the evidence of the appellant vide order dated 9.5.2014 and which order reads as under:-

“PC No. 07/14

Present : Counsel for the petitioner
Counsel for the respondent no. 2
Counsel for the respondent no. 4

Despite the fact that respondent no. 4 was granted opportunity to exercise her option of either coming to India for the purpose of recording her testimony or to get it conducted through Video Conferencing, for which purpose Local Commissioner was appointed. Ld. counsel for the respondent no. 4 is unable to give any precise answer. He has placed on record certain e-mails addressed to him from his client stating that she is suffering from rheumatoid arthritis with joints ache and feels generally unwell from the condition. There is no reason for not exercising the option for recording the testimony through Video conferencing. It appears that the respondent no. 4 has only been resorting to dilatory tactics to prolong the matter.

The petitioner's evidence was closed on 28.1.2013. Having impugned the said order before Hon'ble High Court, she was granted further time by 03.04.2013. She failed to comply with the order of District Courts as well as that of the Hon'ble High Court. Her right to cross examination was again closed on 22.11.2013. The said order was again impugned before the Hon'ble High Court and further opportunity was once again granted to her as a last opportunity. The record reflects that she has been granted several indulgences some even on payment of costs, but she has failed to act thereupon.

It is pointed out not only by the petitioner's counsel but also by the counsels for other respondents who are not objecting to the present

petition, that the respondent no.4 has failed to comply even the order for payment of costs. As per order dated 05.05.2014, the Hon'ble High Court has directed this case to be adjudicated by May 2014.

As no further opportunity can be granted, this suit which is at the stage of final arguments, be listed on 21.05.2014.

Ld. counsel for the respondent no.4 submits that he be discharged from this case. The procedure for seeking discharge has been envisaged in the Delhi High Court rules. There has been no compliance of the same. Advocates cannot be discharged on the mere asking. Prayer declined."

8. Appellant once again challenged the order of the trial court closing her right to lead evidence by filing C.M.(M) No.605/2014 and this C.M.(M) was dismissed by a Learned Single Judge of this Court vide order dated 2.7.2014 and which order reads as under:-

" CM No.10273/2014(exemption)

Allowed, subject to all just exceptions.

CM(M) 605/2014 and CM No.10272/2014(stay)

Learned counsel for the petitioner fairly submits that this is the third round when the petitioner is seeking additional time to lead her evidence. She draws the attention to this Court's order dated 5th May, 2014 whereby the petitioner was granted additional time and permitted to lead her evidence through video conferencing since she was stated to be indisposed and was residing in London. The order impugned in this petition notes that although the respondent No.4 (the petitioner) was granted an opportunity to exercise her option by coming to India or to get her evidence recorded through video conferencing and a Local Commissioner had been appointed to facilitate this, the petitioner had defaulted on both counts. Her counsel was unable to proffer any reason for the default. Indeed her counsel sought discharge of the Court from the case on that date. The Court then concluded that her conduct had only been dilatory. This Court notes that the evidence was supposed to be concluded by end of May, 2014. No evidence has been led on behalf of the petitioner. Learned counsel for the petitioner relies upon a medical certificate dated 31st May, 2014, which states that the petitioner is suffering from Osteoarthritis. In the case of the petitioner the ailment is stated to be symptomatic of severe lethargy/exhaustion and poor

concentration. The medical certificate is of a date subsequent to the time extended by this Court for recording of the petitioner's evidence. It cannot be taken into consideration. Even on merits, the medical certificate does not state that the petitioner is not in a position to depose at all or she would not be able to comprehend queries put to her. From the medical certificate it is not borne out that she is not in a position that she cannot participate in deposition through video conferencing. This Court finds no reason to entertain the petition. Accordingly it is dismissed."

9. It is, therefore, seen that the Courts have been more than lenient and indulgent to the appellant but the appellant failed to lead her own evidence and in fact even failed to utilize the opportunity to get her examination recorded by video conferencing in London. Obviously, the appellant therefore deliberately failed to appear in the witness box, and which shows that she did not have the courage to stand the test of cross-examination. No grievance can be urged on behalf of the appellant with respect to the closure of her right to lead evidence.

10.(i) The first issue which was urged on behalf of the appellant was that the Will should be held to as one which is shrouded in suspicious circumstances because the attesting witness PW-2/Sh. R. Goswami was in fact the Private Secretary of the petitioner in the probate case and therefore since the petitioner was the superior of the

attesting witness Sh. R. Goswami, therefore, the Will should be held to be invalid being shrouded in suspicious circumstances.

(ii) This argument in my opinion has no merit and has been rightly rejected by the trial court by observing that the attesting witness had deposed that he had been regularly visiting the family of the petitioner and had known the deceased testator for 14 years and in which period the deceased testator whenever wanted to get any work done used to approach the attesting witness whether for visa related issues or electricity bills or telephone bills or other problems. In fact, attesting witness Sh. R. Goswami was also the attesting witness to an earlier document being a General Power of Attorney dated 16.6.1997 executed by the deceased testator in favour of the petitioner and proved as Ex.PW1/D2 and that on the basis of this General Power of Attorney the petitioner had been authorized to sell by the deceased testator his property at Calcutta. Therefore, the attesting witness was well known to the deceased testator and the factum of execution of the General Power of Attorney Ex.PW1/D2 also showed that the deceased testator used to trust the petitioner. Attesting witness PW-2 in his cross-examination further clarified that he had developed personal

relationship with the deceased testator in the long period of 14 years. It may be noted that original Will was duly executed as required by law in terms of the deposition of the attesting witness as Ex.PW1/A and the attesting witness deposed that the deceased testator had signed all the pages of the Will in his presence and he and the second attesting witness to the Will Mr. George Matthew has signed the Will dated 18.6.2004 in presence of the deceased testator. PW-2 also deposed that the deceased testator had requested him to bring the second witness for registration of the Will on 30.6.2005, and on 30.6.2005 the Will dated 18.6.2004 was got duly registered in the office of the Sub-Registrar in the presence of both the attesting witnesses. The relevant paras 10 to 12 of the impugned judgment discussing the deposition of PW-2 read as under:-

“10. PW2, Sh. R. Goswami, is one of the attesting witnesses to the Will made by the deceased. He has deposed that the deceased knew him for the last 14 years and used to call him whenever he needed any assistance. He has stated that in the middle of April 2004, the deceased informed him that he wished to make a Will and asked him to be one of the attesting witnesses. On 18.06.2004 he was called by the deceased. The second witness Mr. George Mathew, who was a friend of PW2, also came to be the second attesting witness to the Will. PW2 has stated that the deceased signed on all pages of the Will in their presence. After signing the same, he asked PW2 and Mr. George Mathew to sign as the attesting witnesses. On 15.06.2005, the deceased requested him to accompany him to the office of Sub-Registrar for registration of the Will. The deceased also requested him to bring the second witness along with him. On 30.06.2005 they got the Will dated 18.06.2004 duly

registered in the Office of the Sub-Registrar in his presence and in the presence of the second witness Mr. George Mathew.

11. In his cross-examination, PW2 has stated that the Will was attested by him in his personal capacity and not as a government servant. He admitted being the Private Secretary to Sh. Dipak Chatterjee, the petitioner herein, in the department of Commerce, Government of India. He denied attesting the Will on instruction of his superior officer. He confirmed that his affidavit of evidence was drafted by the petitioner's Advocate. He reiterated that he knew the deceased since 1996 as well as the other family members including Mr. Bijoy Chatterjee, Mr. Amit Chatterjee and the sisters whose names he did not recall. He also confirmed that his relationship with the deceased/testator was at a personal level and that the deceased had relied upon him for help, especially for payment of electricity, telephone, water bills or other problems like Visa etc. The payment of the bills for his Chittranjan Park house was made directly by the deceased and not by his son. He was also a witness to the General Power of Attorney dated 16.06.1997 executed by the deceased/testator in favour of the petitioner in respect of his Kolkata property which is Ex. PW1/D2. He identified the signatures of the deceased on the said document. He denied that the signatures of the deceased on Ex. PW1/D1 and PW1/A were different. He has deposed that when he was called by the deceased for attesting the Will, he did not inform the petitioner nor did he take permission to leave his office on the said date. He took Mr. George Mathew with him who was working as the Private Secretary to the petitioner. At the time of execution of the Will, no other family member was present at the residence at AB-2, Pandara Road, New Delhi. He was aware that the Will was drafted by an Advocate, Mr. Alok Bhattacharya, and this fact was disclosed to him by the deceased himself. He further submitted that the deceased put his signatures on the Will Ex. PW1/A at Point X on page no.1, at Point Y on page no. 2 and at Point Z on page no.3. He did not affix his thumb impression in his presence. The witness had only signed on one page at Point X being the third page of the Ex. PW1/A. He also confirmed that though his signatures were slightly different on Ex. PW1/A and PW2/A but that was because he signed in a different style.

12. PW-2 has stated that at that time the deceased could walk with the help of stick and without the assistance of any help. In his cross examination, he has explained the reason why the address of the deceased/testator on the front of the Will and on Ex. PW2/D4 were different was because the Sub-Registrar had asked for the present residential address of the deceased. He was not aware that whether the testator had informed his son about his intention to execute the Will, but he enjoyed a good relationship with his son. When he went to the office of the Sub-Registrar on 30.06.2005, only he and the other witness had

accompanied the deceased. The registration fees was paid by the deceased. He also did not know who received the original document from the office of the Sub-Registrar. He confirmed that Ex. PW1/A was the Will which he has witnessed on 18.06.2004 at the Pandara Road residence of the deceased/testator. Ex. PW2/D4 was the certified copy of the Will which was registered on 30.06.2005. He did not recall whether the deceased/testator had affixed his thumb impression on the copy of the will or on the impugned Will in the office of the Sub-Registrar. Suggestion put to the witness that he was not the attesting witness to the Will was denied. He also denied the suggestion that he was the attesting witness on instruction of his senior official, namely the petitioner or that he and other witness Mr. George Mathew never met the deceased testator on 18.06.2004 at his residence.”

(iii) I therefore hold that the argument of the appellant that the Will is shrouded in suspicious circumstances as it is attested by attesting witness PW-2 Sh. R. Goswami who was the Private Secretary of the petitioner is an argument without any substance and is therefore rejected.

11.(i) The next argument of the appellant was that the deceased was 89 years when the Will dated 18.6.2004 was executed, and the deceased had already suffered a stroke, and therefore, it should be held that the deceased was not of sound mind when he executed the Will.

(ii) This argument of the appellant is also without any substance because it is seen that after executing the Will on 18.6.2004, and this is deposed to by the petitioner as PW-1, that the deceased visited not

only the appellant in U.K. but also his other son Sh. Bijoy Chatterjee at Holland and he travelled all alone without any escort. Again in the year 2006, the deceased testator travelled all alone to Holland and Belgium to visit his sons. The deceased testator also had travelled to Bangalore and Calcutta without any escort. Deceased testator died much later on 10.10.2010. All these aforesaid aspects were proved by the PW-1 in his deposition and there is no cross-examination of PW-1 on any of the aforesaid aspects as observed by the trial court. The deceased testator had suffered a stroke in the year 2007 i.e after the execution of the Will. In my opinion therefore as per the facts found on record it cannot be argued by the appellant that the deceased was not of sound mind when he executed the Will dated 18.6.2004.

12.(i)s The next argument which is urged is that the Will should be held to have been affected by undue influence because the deceased testator was living with the petitioner and which allowed the petitioner to get the Will executed by undue influence.

(ii) Once again this argument urged on behalf of the appellant is completely misconceived because no doubt the deceased testator used to live with the petitioner/his son, however, this fact in itself cannot

mean that undue influence came into existence for execution of the Will dated 18.6.2004. The fact that there is no undue influence also becomes clear and the fact that the deceased testator used to regularly travel not only within the country but abroad to visit the appellant as also the sons of the appellant in UK and Holland and which trips were made by the deceased testator all alone. The deceased testator therefore clearly was a fit and sound minded person and it cannot be held that the subject Will dated 18.6.2004 was got executed by the petitioner by exercising undue influence. On behalf of the appellant a weak endeavour was made to show that the Will was allegedly got registered before the Sub-Registrar-VII instead of Sub-Registrar-V, however, besides this aspect only being a legal plea and showing only a mistake as to the place of Registration of the Will, it is seen from the record that the appellant has failed to lead any evidence as to why the Will should have been registered with the Sub-Registrar-V and not with Sub-Registrar-VII. In any case if this argument is at best towards the fact that the deceased testator was not of sound mind, however, the argument that the deceased testator was in fact of sound mind when the subject Will was executed has been dealt with above and rejected,

and which discussion is not reproduced herein to avoid repetition. This argument of the appellant is also therefore rejected.

13. Learned counsel for the appellant then argued that the last page of the Will is added however I find this argument without any merit because the second last page of the Will ends by the Will being completed and the deceased testator signing the same and thereafter since there was no place therein for typing of further statement with regard to the attesting witnesses signing in the presence of the testator and the testator signing in the presence of the attesting witnesses therefore these lines have been typed on the next page and also the signatures and the addresses of the attesting witnesses thereafter have been put on the next page. The aforesaid lines as also the signatures and the details of the attesting witnesses are such that it could not have been accommodated on the second last page of the Will, and therefore, I do not find any substance in the argument that the last page of the Will has been added later on. In any case this argument is misconceived because the certified copy of the Will registered with the Sub-Registrar has been proved in the trial court record as

Ex.PW2/D4 and wherein all the pages of the Will are found. This argument of the appellant is therefore rejected.

14. It was next argued on behalf of the appellant that there is no explanation for delay in registration of the Will after about one year, however, in my opinion the delay in registration would not in any manner make a difference in the present case because the deceased testator Sh. Bisweswar Chatterjee died much later on 10.10.2010. Mere factum of delay in registration of the Will, in my opinion, therefore in the facts of the present case cannot lead to the conclusion that this is a suspicious circumstance for setting aside the subject Will. Also, at best this argument of the appellant would mean that the Will is not registered, however, in law the Will does not have to be compulsorily registered. This argument of the appellant is also therefore rejected.

15. The last argument urged on behalf of the appellant was that the deceased testator Sh. Bisweswar Chatterjee had promised her that she would get a share in the property of the deceased father/testator/Sh. Bisweswar Chatterjee, however, it is seen that the appellant did not appear in the witness box to depose so and stand the

test of cross-examination on this aspect as also various other aspects pleaded by her, hence the appellant cannot contend that the Will should be set aside allegedly on the ground that the deceased father/testator/Sh. Bisweswar Chatterjee had promised to give her a share in the property. Even assuming for the sake of arguments, that the deceased father had promised to give to the appellant a share, the same cannot be said to create legal basis for questioning the validity of the subject Will, inasmuch as, merely by the appellant being promised would not mean that the deceased testator was bound to give her a share in the property owned by the deceased testator and the final intention of the devolution of the property can only be known by the Will of the deceased testator, and the duly executed Will in the present case gives the property only to the petitioner to exclusion of all other legal heirs. As already noted above, four other brothers and sisters have given their consent to the grant of probate and it is only the appellant who had objected to the same. In my opinion therefore the argument of the appellant that the father had promised her a share but since the Will gave property owned by the deceased testator only to the petitioner, and therefore the Will be set aside, is not an argument

which can be accepted by the Court for setting aside the subject Will which has otherwise been proved in accordance with law as having been executed by the deceased testator Sh. Bisweswar Chatterjee in sound disposing mind.

16. In view of the above discussion, I do not find any merit in the appeal and the same is hereby dismissed.

NOVEMBER 08, 2017

AK/Ne

VALMIKI J. MEHTA, J